Gan Jin Sim @ Gan Gim Sim (as administrator of the estate of Gan Lai Kim, deceased) v Swi Chuan @ Nan Swu Chuan & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO D-02(NCVC)(A)-2109–12 OF 2014
ABDUL AZIZ ABDUL RAHIM, PRASAD ABRAHAM AND ZAMANI A RAHIM JJCA
20 OCTOBER 2016

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Contract — Frustration — Supervening events — First respondent entered into sale and purchase of land with vendors — Land vested in estate of deceased by virtue of court's order — Whether sale and purchase frustrated — Whether first respondent entitled to sustain claim and beneficial interest over land — Contracts Act 1950 ss 57 & 71

D

The first respondent had entered into a sale and purchase agreement ('the agreement') of a piece of land known as Lot 29 with the administrators of estate of Gan Soon Cheow ('the vendors'). Gan Soon Cheow was the previous administrator of the estate of Gan Lai Kim ('the deceased'). Under the said agreement, the respondents had paid the sum of RM46,954.85 as deposit to the vendors. The said amount was later utilised by the vendors to discharged Lot 29 which was previously charged by the registered owner of the said land ie Gan Soon Cheow to Chartered Bank Bhd ('the chargee'). By virtue of a High Court order ('the said order'), Lot 29 was vested in the estate of the deceased. In the court below, the appellant on behalf of the estate of the deceased filed an action against the first respondent and sought a declaration that the first respondent's occupation of the land constituted trespass. In the present appeal, the first respondent submitted that since the agreement remains in force, the first respondent would be entitled to sustain a claim and for a beneficial interest over the land.

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Held, allowing the appeal and setting aside the order of the High Court:

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(1) The sale and purchase had been frustrated by operation of law as the sale and purchase could not now be performed as by virtue of the said order, Lot 29 was vested in the estate of Gan Lai Kim. Since that order was not appealed against, the sale and purchase would be deemed frustrated (see para 7).

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(2) The evidence was undisputed that the sum of RM46,954.85 paid by the appellant to the vendors was used to discharge the entire Lot 29 from the charge. The aforesaid sum was used for the benefit of Lot 29 which in

turn benefitted the appellant. Applying s 71 of the Contracts Act 1950, the court ordered that the estate of the deceased refund the said sum to the respondents (see paras 8–10).

[Bahasa Malaysia summary

Responden pertama telah memasuki perjanjian jual beli ('perjanjian') sebidang tanah yang dikenali sebagai Lot 29 dengan pentadbir estet Gan Soon Cheow ('penjual-penjual'). Gan Soon Cheow adalah pentadbir terdahulu estet Gan Lai Kim ('si mati'). Di bawah perjanjian tersebut, responden-responden telah membayar sejumlah RM46,954.85 sebagai deposit kepada penjual-penjual. Jumlah tersebut kemudiannya digunakan oleh penjual-penjual untuk melepaskan Lot 29 yang terdahulu dicaj oleh pemilik berdaftar tanah tersebut iaitu Gan Soon Cheow kepada Chartered Bank Bhd ('pemegang gadaian'). Mengikut perintah Mahkamah Tinggi ('perintah tersebut'), Lot 29 diletakhakkan di dalam estet si mati. Di Mahkamah Tinggi, perayu bagi pihak estet si mati memfailkan tindakan terhadap responden pertama dan memohon deklarasi bahawa penghunian responden pertama di atas tanah tersebut membentuk pencerobohan. Dalam rayuan ini, responden pertama berhujah bahawa memandangkan perjanjian kekal berkuat kuasa, responden pertama berhak untuk mengekalkan tuntutan dan kepentingan benefisial ke atas tanah tersebut.

Diputuskan, membenarkan rayuan dan mengenepikan perintah Mahkamah Tinggi:

(1) Jual beli telah dikecewakan oleh operasi undang-undang kerana jual beli tidak sekarang dapat dilaksanakan kerana mengikut perintah tersebut, Lot 29 diletakhakkan di dalam estet Gan Lai Kim. Memandangkan perintah tersebut tidak dibantah, jual beli akan dianggap dikecewakan (lihat perenggan 7).

(2) Keterangan tidak dipertikaikan bahawa jumlah RM46,954.85 yang dibayar oleh perayu kepada penjual-penjual digunakan untuk melepaskan keseluruhan Lot 29 daripada caj. Jumlah tersebut digunakan untuk kepentingan Lot 29 yang mana memberi faedah kepada perayu. Menggunapakai s 71 Akta Kontrak 1950, mahkamah memerintahkan bahawa estet si mati membuat bayaran balik jumlah tersebut kepada responden-responden (lihat perenggan 8–10).]

Notes

For a case on supervening events, see 3(3) *Mallal's Digest* (5th Ed, 2015) para 5277.

Cases referred to

Public Finance Bhd v Ehwan bin Saring [1996] 1 MLJ 331, HC (refd)
Ramli bin Zakaria & Ors v Government of Malaysia [1982] 2 MLJ 257, FC (refd)

Legislation referred to

Contracts Act 1950 ss 57, 71

Appeal from: Originating Summons No 24NCVC-348–09 of 2013 (High Court, Kota Bharu)

Wee Choo Keong (Wee Choo Chin with him) (CC Wee & Co) for the appellant.
Aznam bin Mohamed (Wan Nor Idayu bt Wan Jusoh with him) (Adli Aznam & Akram) for the respondents.

Prasad Abraham JCA:

[1] We heard and disposed this appeal on 12 November 2015 wherein we allowed the appeal and set aside the order of the High Court and we further ordered that the estate of Gan Lai Kim (No I/D 0143227), deceased, to refund the deposit ie a sum of RM46,954.85 free of interest to the respondents and until the said money was paid in full, the respondents be at liberty to occupy the said land without rental and thereafter to vacate the same.

[2] Material facts:

(a) Gan Lai Kim, ('the deceased') passed away without leaving a will on 23 January 1971. The deceased left behind property which included land known as Lot 29 Seksyen 1, Bandar Kota Bharu, Kelantan ('Lot 29');

(b) the present appellant is the current administrator of the deceased replacing the previous administrator Gan Soon Cheow whose appointment was revoked by court;

(c) the first respondent occupies part of Lot 29 in a dwelling house whilst the rest of Lot 29 were occupied by the second respondent;

(d) the appellant on behalf of the estate of the deceased filed an originating summons in court seeking, a declaration that the first respondent's occupation of that portion of Lot 29 constituted trespass as the first respondent occupied the same unlawfully and without payment of rental;

(e) the first respondent claimed to have occupied part of the said land since 23 December 1971. Further on 26 February 1981 the first respondent bought part of Lot No 129 vide sale and purchase dated 26 February

1981 ('the said sale and purchase agreement') and the vendors the estate of Gan Soon Cheow namely through the administrators Aong Chai Nga and Gan Chon Tat ('the vendors');

(f) at the material time above, the whole of Lot 29 was registered under the name of Gan Soon Cheow under the said sale and purchase agreement (P2) pp 228–229/*RR Jld* 2, the respondents had already paid the sum of RM46,954.85 ('the deposit') to the vendors;

(g) Gan Soon Cheow, the registered owner of Lot 29, charged the whole of Lot 29 to Chartered Bank Bhd ('the chargee') via presentation No 65/76 Gadaian No 8/76 (p 228 *RR Jld* 2). The vendors had utilised the deposit to discharge Lot 29 on 12 March 1980 to avoid Lot 29 being foreclosed by the chargee (*RR Jld* 2 p 229);

(h) it was provided for under the said sale and purchase agreement that the first respondent had the right to enter possession of the said land; and

(i) as a consequence of a suit, Guaman Sivil No 53 Tahun 1981 the High Court in Kota Bharu made an order therein. The essence of the said order was Lot 29 was to vest in the estate of Gan Lai Kim ie the deceased (see p 53 grounds of judgment *RRT*).

[3] It is the argument of the first respondent that the first respondent has a beneficial claim over that portion of Lot 29 by virtue of the sale and purchase agreement and submit that since the sale and purchase remains in force, the first respondent would be entitled to sustain a claim and for a beneficial interest over that portion of Lot 29.

[4] The effect of the said order of the Kota Bharu High Court was that Lot 29 now vests in the estate of Gan Lai Kim and therefore, the vendors in the sale and purchase agreement have had no title legal or beneficial to give to the first respondent.

[5] We are of the view that is a 'classic case' of frustration of the sale and purchase by virtue of supervening events ie the order of the High Court Kota Bharu (see s 57 of the Contracts Act 1950). The law on the subject has been clearly set out in the decision of the Federal Court in *Ramli bin Zakaria & Ors v Government of Malaysia* [1982] 2 MLJ 257 wherein we refer to the judgment of Abdul Hamid FJ at p 261 right hand column D to p 262 right hand column para F as follows:

> Assuming there was in law frustration, then in that event the judge was perfectly right in holding that the contract was discharged on ground of impossibility of performance. With respect we do not agree. We are inclined to think that there was no frustration and the reason is that it was capable of being performed. The relevant provision on the doctrine of frustration is set out under our Contracts Act 1950 s

57(2) which reads:

> (2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

The introductory passage in a chapter dealing with discharge by frustration in 'The Law of Contract in Malaysia and Singapore — Cases and Commentary' by Visu Sinnadurai at p 487/8 reads:

> A contract is frustrated when there is a change in the circumstances which renders a contract legally or physically impossible of performance. According to the House of Lords in the case of *Joseph Constantine Steamship Line, Ltd v Imperial Smelting Corpn Ltd* the doctrine 'is only a special case of the discharge of contracts by an impossibility of performance arising after the contract was made'. Section 57(2) of the Contracts Act 1950 states the doctrine thus:
>
> > A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.
> >
> > The Act does not define the word 'impossible'. However, it appears that the wording of the section envisages two main instances of frustration — when a contract to do an act becomes (a) impossible or (b) unlawful. It is clear that the frustration should be supervening and subsequent to the formation of the contract. Furthermore, it should be some event which the promisor could not prevent, as a 'self-induced frustration' does not discharge a party of his contractual obligation (*Maritime National Fish Ltd v Ocean Trawlers Ltd*).

With reference to the present case, the question is whether the change in the salary scale rendered performance impossible. Before answering the question we would refer to the English law with regard to the proper test of frustration. The law on this point is succinctly set out in 'Chitty on Contracts — General Principles' (24th Ed) p 658/9 as follows:

> In view of the decision of the House of Lords in *Davis Contractors Ltd v Fareham UDC* the proper test for frustration may be formulated as follows: If the literal words of the contract were to be enforced in the changed circumstances, would this involve fundamental or radical change from the obligation originally undertaken? In this case Lord Radcliffe said: '… frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do … There must be … such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.
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> Lord Reid put the test for frustration in a similar way. 'The question is whether the contract which they did make is, on its true construction, wide enough to

apply to the new situation: if it is not, then it is at an end'. Later in his speech, he approved the words of Asquith LJ. that the question is whether the events alleged to frustrate the contract were 'fundamental enough to transmute the job the contractor had undertaken into a job of a different kind, which the contract did not contemplate and to which it could not apply' (*Parkinson (Sir Lindsay) & Co Ltd v Commissioner of Works*).

[6] We also refer to the case of *Public Finance Bhd v Ehwan bin Saring* [1996] 1 MLJ 331 wherein Mohd Ghazalli J said at p 343 (para D) to p 344 (para G), as follows:

He further argued that the contract has been frustrated when the vehicle was seized and that the parties must now be put back in their original position, viz, the appellant must refund to the respondent all monies already paid to the appellant. He then referred to ss 57(2) and 66 of the Contracts Act which reads:

Section 57(2)

> A contract to do an act which, after the contract is made, becomes impossible, or by reason of any event which the promisor could not prevent, unlawful, becomes void when the act itself becomes impossible or unlawful.

Section 66

> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

In his reply counsel for the appellant argued that where you have an Act you cannot import common law; furthermore although the position at common law has been preserved by s 7(4) of the said Act, the letter of indemnity has excluded that common law position. He then again insisted that the letter of indemnity is not part of the said agreement and hence is not caught by s 34 of the said Act.

With respect, I cannot see how the above arguments forwarded by the appellant can hold water. The conduct and actions on the part of the appellant clearly show that when the said agreement was entered into, the appellant has represented that they are the owners of the said vehicle which, to me, would mean that they represented that they were capable of giving a good title to the respondent whenever the latter decides to pay the net balance due which would then result in the hiring coming to an end; this has been agreed to under the said agreement as is reflected in cl 8 (p 109 of the appeal record) which reads:

> This Agreement shall not be nor be construed to be a purchase or an agreement for the purchase of the Goods by the hirer but if the Hirer shall duly perform and observe all the stipulations and conditions in this Agreement contained on his part to be performed and observe and shall in manner aforesaid pay to the Owner all sums of money payable to the Owner by the Hirer hereunder the hiring shall come to an end and the Goods shall become the property of the Hirer

and Owner will assign and make over all the Owner's right benefit and interest in the same to the Hirer but until all such payments as aforesaid shall have been made the Goods shall remain the absolute property of the Owner.

The evidence adduced at the trial however have shown that about six weeks after the said agreement was executed, the said vehicle was seized by the Customs and since that seizure, the vehicle has not been returned to either the appellant or the respondent. The subject-matter of the said agreement is now in the possession of the Customs and has not been returned whereas in *Ahmad Ismail v Malayan Motor Company & Anor*, which was referred to by counsel for the appellant, the position was different — in that case, the police returned the vehicle upon finding that the vehicle was not in fact a stolen vehicle and as such, there could be no question that the title could not pass to the hirer at the time when the property was to pass. In the instant case, it would seem that the said vehicle is now deemed to be forfeited by the Customs pursuant to s 128(1) of the Customs Act (referred to earlier).

That being so, I am of the view that in accordance with s 57(2) of the Contracts Act, the said agreement has become void as it would now be impossible for the appellant to assign and make over all its right, benefit and interest in the said vehicle as they now have a defective title. When the appellant entered into the said agreement, it stood in the shoes of the said Tan; they have received an advantage under the said agreement, namely, the RM57,000 which the respondent has paid towards the purchase of the said vehicle. Accordingly, since the said agreement is now void as it would now be impossible for the appellant to pass a good title over the said vehicle.

I am of the view that they are bound, in accordance with s 66 of the Contracts Act, to return the RM57,000 which they have received from the respondent I would think that upon these grounds alone that the respondent would be entitled to his claim.

[7] It is our considered view, that the sale and purchase has been frustrated by operation of law as the sale and purchase cannot now be performed as by virtue of the said order of the High Court Kota Bharu, Lot 29 vests in the estate of Gan Lai Kim and since that order was not appealed against, the sale and purchase would be deemed frustrated.

[8] The evidence is undisputed that the sum of RM46,954.85 paid by the appellant to the vendors was used to discharge the entire Lot 29 from the chargee. It is the submission of the appellant that the respondents should claim the refund of these monies from the vendors and not the appellant.

[9] It is our view that the aforesaid sum was used for the benefit of Lot 29 which in turn benefitted the appellant, in particular the estate of Gan Lai Kim. Applying s 71 of the Contracts Act 1950 which we now set out:

71 Obligation of person enjoying benefit of non-gratuitous act

Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit

thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

[10] In the upshot, we ordered that the estate of Gan Lai Kim refund the sum of RM46,954.85 to the respondents.

Appeal allowed; order of High Court set aside.

Reported by Dzulqarnain Ab Fatar